

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MICHAEL E. DUNBAR,)	
)	
Plaintiff)	
)	
v.)	Civil No. 96-0163-B
)	
ARMAND PELLETIER, et al.,)	
)	
Defendants)	

RECOMMENDED DECISION

This matter is before the Court on Plaintiff's Motion for Default Judgment against Defendants Donald Shields, Ingrid Kiefer, Fort Hill Financial, Inc., Fort Hill Realty Trust and the Kiefer Group. Defendant Armand Pelletier was previously dismissed due to Plaintiff's inability to effectuate service of process.

None of the remaining Defendants have appeared in the action in any capacity. Accordingly, hearing was had on the Motion on March 20, 1997, without notice to Defendants. Fed. R. Civ. P. 55(b)(2). On the basis of the evidence presented at the hearing, and the allegations contained in Plaintiff's Complaint, the Court hereby proposes the following Findings of Fact and Conclusions of Law.

Findings of Fact and Conclusions of Law

1. The Court's inquiry on Plaintiff's Motion for Default Judgment is "limited to a determination of whether [Plaintiff has been damaged] and the extent to which any such [damage] was attributable to the violations established by the default, rather than to causes beyond the scope of the suit." *Brockton Savings Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5, 12-13 (1st Cir. 1985) (citation omitted). "[T]here is no question that, default having been entered, each of [Plaintiff's] allegations

of fact must be taken as true and each of [his] claims must be considered established as a matter of law." *Id.* at 13.

2. Plaintiff's Complaint alleges among other things, and it is therefore established, that:

a. On or about August 3, 1995, Defendant Fort Hill Financial, Inc. gave Plaintiff a valid promissory note in the principal amount of \$50,000. (Count I).

b. The promissory note was to be paid in full, together with a premium of \$10,000, on or before August 31, 1995. (Count I).

c. Defendant Donald Shields personally guaranteed the \$50,000 note. (Count III).

d. The note provided that Defendants would be responsible for "all costs of collection including a reasonable attorney's fee" in the event of default. (Count I).

e. Despite Plaintiff's repeated demands, the note remains due and payable. (Counts I & III).

f. On or about October 13, 1995, Defendant Fort Hill Financial, Inc. gave Plaintiff a valid promissory note in the principal amount of \$70,000. (Count IV).

g. The promissory note was to be paid in full, together with interest in the amount of \$4,000, within 6 days of the date of the note. (Count IV).

h. Defendant Donald Shields personally guaranteed the \$70,000 note. (Count VI).

i. The note provided that Defendants would be responsible for "all costs of collection including a reasonable attorney's fee" in the event of default. (Count I).

j. Despite Plaintiff's repeated demands, the note remains due and payable.
(Counts IV & VI).

k. On or about November 1, 1995, Defendant Fort Hill Financial, Inc. told Plaintiff that if they were permitted to retain and invest the \$74,000 due on the October 13 note, Plaintiff would receive an additional credit of \$25,000, which amount would also be invested on Plaintiff's behalf. (Count VII).

l. On or about November 1, 1995, Defendant requested Plaintiff invest an additional \$28,000. Plaintiff issued Defendant a check in that amount. (Count VII).

m. Defendants Fort Hill Financial, Inc., Donald Shields, Ingrid Kiefer and The Kiefer Group represented that Plaintiff would be paid \$127,000 in full by March 1, 1996, and would receive an additional \$127,000 per quarter for each of five quarters thereafter. (Count VII).

n. Plaintiff has not received repayment of his initial investment nor any profit.
(Count VII).

o. On or about April 13, 1996, Defendants Fort Hill Financial, Inc., and Donald Shields solicited from Plaintiff the sum of \$15,000 to aid in funding the plaintiff in the matter of *Catherine D. Petit, et al. v. Bernstein, Shur, Sawyer & Nelson, et al.*, pending in York County Superior Court under docket number CV-86-608. (Count VIII).

p. Defendants promised to repay Plaintiff in full, together with interest in the amount of \$300, by April 16, 1996. (Count VIII).

- q. On or about April 16, 1996, Defendants issued a check to Plaintiff that purported to pay the \$15,300 then due. Plaintiff has been unable to cash the check for insufficient funds in Defendants' account. (Count VIII).
3. Plaintiff testified, and the Court finds, that he transferred to Defendants the amounts represented in the promissory notes.
4. Plaintiff is entitled to damages on Counts I and III of the Complaint, jointly and severally against Defendants Fort Hill Financial, Inc., and Donald Shields in the amount of \$60,000 (total amount due on promissory note).
5. Plaintiff is entitled to damages on Counts IV and VI of the Complaint, jointly and severally against Defendants Fort Hill Financial, Inc., and Donald Shields in the amount of \$74,000 (total amount due on promissory note).
6. In Count VII, Plaintiff alleged, and it is therefore established, that the Defendants' actions in securing the \$70,000 loan, and the additional \$28,000 payment, violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ["RICO"]. Plaintiff is therefore entitled to treble the damages he proves were caused by the RICO violation. 18 U.S.C. § 1964(c); *DeMent v. Abbott Capital Corp.*, 589 F. Supp. 1378, 1386 (N.D. Ill. 1984).
7. The Court finds that the \$4,000 interest promised for the \$70,000 loan, and the six payments of \$127,000 profit on Plaintiff's investment, as set forth in Count VII of the Complaint, were not damages *caused by* the RICO violation. Plaintiff did not suffer the loss of these opportunities as a result of the fraudulent conduct. Instead, it was the opportunities themselves that were fraudulent. *See, Heinold v. Perlstein*, 651 F. Supp. 1410, 1412 (E.D. Pa. 1987) (where plaintiff's only injury was

to "an expectation interest that would not have existed but for the alleged RICO violation, it would defy logic to conclude that the requisite causation exists").

8. Plaintiff is entitled to damages on Count VII of the Complaint, jointly and severally against Defendants Fort Hill Financial, Inc., Donald Shields, Ingrid Kiefer, and The Kiefer Group, in the amount of \$294,000 (amounts invested by Plaintiff (\$70,000 + \$28,000) multiplied by 3).

9. Plaintiff is entitled to damages on Count VIII of the Complaint, jointly and severally against Defendants Fort Hill Financial, Inc., and Donald Shields in the amount of \$15,300 (total amount due on promissory note).

10. In Count IX, Plaintiff alleged, and it is therefore established, that the Defendants' actions in securing the \$15,000 loan violated RICO. Plaintiff is therefore entitled to treble the damages he proves were caused by the RICO violation. 18 U.S.C. § 1964(c); *DeMent*, 589 F. Supp. at 1386.

11. In Count X, Plaintiff alleged, and it is therefore established, that the Defendants' actions in securing the \$60,000 loan violated RICO. Plaintiff is therefore entitled to treble the damages he proves were caused by the RICO violation. 18 U.S.C. § 1964(c); *DeMent*, 589 F. Supp. at 1386.

12. The Court finds that the \$10,000 "premium" promised for the \$60,000 loan, and the \$300 interest promised for the \$15,000 loan, as forth in Counts I and VIII respectively, were not damages *caused by* the RICO violation. Plaintiff did not suffer the loss of these opportunities as a result of the fraudulent conduct. Instead, it was the opportunities themselves that were fraudulent. 13.

Plaintiff is entitled to damages on Count IX of the Complaint, jointly and severally against Defendants Fort Hill Financial, Inc., and Donald Shields in the amount of \$45,000 (amount invested by Plaintiff (\$15,000) multiplied by 3).

14. Plaintiff is entitled to damages on Count X of the Complaint, jointly and severally against Defendants Fort Hill Financial, Inc., and Donald Shields in the amount of \$150,000 (amount invested by Plaintiff (\$50,000) multiplied by 3).

15. The Court finds Plaintiff's reasonable attorneys fees total \$1,587.50. Plaintiff's expenses total \$545.63.

Conclusion

Accordingly, I hereby recommend Judgment be entered in favor of Plaintiff on default judgments against the various Defendants as follows:

1. Against Defendant Fort Hill Financial, Inc., and Defendant Donald Shields, jointly and severally in the total amount of \$344,300.

2. Against Defendant Fort Hill Financial, Inc., Defendant Donald Shields, Defendant Ingrid Kiefer, and Defendant The Kiefer Group, jointly and severally in the total amount of \$294,000.

In addition, I recommend Plaintiff be awarded his attorneys fees in the amount of \$1,587.50 and expenses in the amount of \$545.63 as against Defendants Fort Hill Financial, Inc., and Donald Shields.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated in Bangor, Maine on May 14, 1997.